LIM TOK CHIOW & ANOR.

v.

DIAN TONG CREDIT & DEVELOPMENT SDN. BHD.

HIGH COURT BORNEO, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[COMPANIES WINDING-UP NO. KG.2 OF 1992]
8 APRIL 1994

COMPANY LAW: Winding-up petition pursuant to s. 218(e) of Companies Act 1965 - Respondent filing affidavit in opposition - Failure to comply with r.30(1) of the Companies (Winding-up) Rules 1972 as to service - Whether affidavit admissible - Reliance on presumption of inability to pay - Section 218(2)(a) of CA 1965 - Non-quantification of sum due under notice of demand - Whether notice complied with requirement of sub-section 2(a) of s. 218 - Affidavit verifying petition affirmed before presentation of petition - Non-compliance with r. 26 of 1972 Rules - Whether defect curable - Whether petition a nullity.

On 4 May 1992 the petitioners presented a petition pursuant to s. 218(1)(e) of the Companies Act 1965 (the Act) for the winding-up of the respondent company on the ground that it was unable to pay its debts under a default judgment obtained against it. On 20 December 1991 the respondent was served with a notice demanding payment but the respondent failed to comply with the notice. Accordingly the petitioners relied on the presumption of the inability to pay pursuant to s. 218(2)(a) of the Act. The respondent filed an affidavit in opposition alleging non-compliance with the Companies (Winding-up) Rules 1972 (the Rules) which admisibility was objected to by the petitioners for breach of r. 30(1) of the Rules in respect of the time prescribed for service of the affidavit. Counsel for the respondent invited the Court to exercise its discretion under r. 193 of the Rules to abridge time for the filing of the affidavit.

The Court raised the issue of whether the notice of demand complied with the provisions of sub-section 2(a) of s. 218 of the Act which required the notice to state the sum due and owing. The Court also raised the issue of the validity of the petition as the affidavit verifying the petition was affirmed before the presentation of the petition. Counsel for the petitioners submitted that the Rules were silent as to the requirement to quantify the interest due on the principal sum and that the defect with respect of the affidavit verfying the petition was curable by rr. 193 and 194 of the Rules.

Held:

[1] There was no merit in exercising the Court's discretion to abridge time for the filing of the respondent's affidavit as no explanation was given for the delay and from the circumstances of the case it was clearly the fault on the part of the respondent for having delayed the matter after having been served with the petition and having been informed of the hearing date well before hand. The Court accordingly ruled that the affidavit was not admissable being in breach of r. 30(1).

[2] At the time of filing of the petition the Court must know the amount of the debt that the respondent was alleged to have been unable to pay to invoke the presumption that the respondent was unable to pay its debt under sub-section 2(a) of the Act. This amount had to be quantified up to the time of the issue of the notice of demand to the respondent. This quantification together with the quantified amount in items (i), (ii) and (iv) will be the total sum due from the respondent to the petitioners as at the date of the issue of the notice of demand for the purpose of sub-section 2(a) of the Act. Failure to settle these quantified amounts within the three weeks stipulated under the sub-section will cause the presumption to operate against the respondent for the purpose of s. 218(1)(e) of the Act. As the notice of demand did not quantify the amount due, the Court was of the view that the respondent could not be presumed to be unable to pay its debts and the petition based on such a notice of demand was defective, and for that reason alone, the petition must be struck out.

[3] Whatever view is taken as to the purpose of the affidavit verifying the petition be it in a bankruptcy or winding-up case, the general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the Court. It cannot serve the purpose of verifying something which is non-existent at the time it was sworn. More so in a winding-up case, where the legislature deems it fit to prescribe time frames for doing certain things, i.e. not only as to verification of a petition already presented but also to be filed within a prescribed period. It was therefore not sufficient merely to say in submission that the Court should apply its discretion to extend time pursuant to r. 193. The petition in this case was bad for the absence of an affidavit verifying the same in accordance with r. 26 of the Rules.

[Petition struck off with no order as to costs].

Cases referred to:
Sobri bin Arshad v. Associated Tractors Sdn. Bhd. [1991] 1 CLJ 798 / [1991] 3 MLJ 32 ***(foll)***
Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(refd)***
Sam Hin Timber Co. v. Perusahaan Sri Duyong Sdn. Bhd. [1983] 2 CLJ 269 ***(refd)***
Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 173 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 6(1)
Bankruptcy Rules 1969, r. 106
Companies Act 1965 - s. 218(1)(e), (2)(a)
Companies (Winding-up) Rules 1972, rr. 7(1), 26, 30(1), 193, 194

Other sources referred to:
English and Empire Digest Replacement, Vol. 10, 1975 reissue, p. 959, case 5667

For the petitioners - Loretta Lau; M/s. Ibrahim & Co.
For the respondents - Albert Tang; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:
On 4 May 1992 the petitioners presented a petition dated 30 April 1992 for the winding-up of the respondent company on the ground that it was unable to pay its debts on account of a default judgment obtained by the petitioners against the respondent company on 2 August 1990 which was not complied with. The petition is made pursuant to s. 218(1)(e) of the Companies Act 1965 (hereinafter referred to as "the Act") which empowers the Court to wind-up a company which is unable to pay its debts. According to the petition, on 20 December 1991 the respondent company was served with a notice pursuant to the section demanding for the payment but it failed or neglected to comply with the notice. The petitioners are therefore relying on the presumption of the inability to pay pursuant to s. 218(2)(a) of the Act.

On 19 August 1993 the managing director of the respondent company filed an affidavit in opposition alleging that the petitioners have not complied with the Companies (Winding-up) Rules 1972 (hereinafter referred to as "the Rules") and that the petition was defective for such non-compliance and ought therefore to be dismissed with costs. No particulars of the non-compliance were given in the said affidavit apart from saying that the petitioners have not complied with the Rules. When the petition came up for hearing on the following day, i.e. 20 August 1993, the learned Counsel for the petitioners objected to the admissibility of the said affidavit in opposition for failure to comply with the time prescribed by r. 30(1) of the Rules which requires a minimum period of seven days for the service of the said affidavit on the petitioners. The learned Counsel for the respondent invited the Court to exercise its discretion under r. 193 of the rules to abridge the time for the filing of the said affidavit. I see no merit in the Court exercising its discretion in the matter because no explanation was given for the delay and from the circumstances of the case it is clearly the fault on the part of the respondent for having delayed in the matter after having been served with the petition on 17 June 1993 and having

been informed of the hearing date well before hand. I accordingly ruled that the said affidavit is not admissible being in breach of said r. 30(1). On this first day of hearing the matter was adjourned at the request of the learned Counsel for the petitioners to enable a proper submission to be prepared on the observations made by the Court in regard to non-quantification of the sum due under the notice of demand pursuant to s. 218(2)(a) of the Act, the affidavit verifying the petition being affirmed before the presentation of the petition, and on the service of the petition on the respondent company. Though technically the respondent company does not file any opposition to the petition for the reason stated above, but the Court feels that in order for it to properly exercise its discretion sought for by the petitioners for a winding-up of the respondent company under s. 218(1)(e) of the Act and using the presumption under sub-section (2)(a) thereto, it needs to be satisfied that the petition is a proper one before it would make the appropriate order sought. During the adjournment, the respondent company filed a fresh affidavit in opposition which is a repetition of the first impunged affidavit. I consider it as an abuse of r. 30 by the respondent and by so refiling of the affidavit, it would not help the respondent company for the hearing of the petition has commenced and in any event, it lacks particulars of the objection. I would, therefore, discard the consideration of the so-called objection contained in the second affidavit.

In order to invoke the discretion of the Court under s. 218(1)(e) of the Act to wind-up a company, it is for the petitioner to satisfy the Court that the company is unable to pay its debts. The petitioners in this case rely on the presumption provided by sub-section (2)(a) that the respondent company has failed or neglected to comply with the statutory notice provided by the said sub-section. There is no dispute in this case that the notice of demand had been served on the respondent company but the issue is whether the said notice complies with the requirement of the sub-section for the presumption to arise? Sub-section 2(a) requires the notice to state the sum due as owing and if after three weeks the sum so due is not paid then a presumption will arise that the company is unable to pay its debts. The notice exhibited as B to the petition recites as follows:

> Take notice that you are now required to pay to us as solicitors for Lim Tok Chiow and Chong Nyuk Lan (f) both of Lot 8346, Floor, s. 64, Jalan Sungei Sekama, Off Jalan Padungan, 93100 Kuching, Sarawak, the following:
>
> (i) the principal sum of RM107,975;
> (ii) the sum of RM14,800 being interest calculated as at 15 February 1990;
> (iii) interests at 12% per annum on the sum of RM147,500 from 15 February 1990 to 28 February 1990 then thereafter at the rate of 12% per annum on the principal sum of RM107,975 from 29 February 1990 till full and final settlement; and
> (iv) costs of RM225
>
> being the balance of the outstanding amount due under a judgment in default of appearance of the High Court in the above mentioned suit within Twenty-One (21) days from the date of the receipt of this notice, failing which you shall be deemed to be unable to pay your debts and appropriate action will be taken for the winding-up of Dian Tong Credit & Development Sdn. Bhd.
>
> Dated this 20 December 1991.
>
> (Sgd)
>
> ....
>
> Messrs Ibrahim & Company
> Solicitors for the Judgment Creditor,
> Lim Tok Chiow and Chong Nyuk Lan (f)
> whose address for service is at
> No. 39 Jalan P. Ramlee, (lst Floor) Kuching, Sarawak.

Under item (iii) above the amount is not quantified but to be left to the respondent company to calculate the amount due under the item and to have that settled as well within the twenty-one days period given, failing which it is deemed to be unable to pay its debts and action would be taken to wind-up the respondent company under s. 218 of the Act. The learned Counsel for the

petitioners submitted that the rules are silent as to the requirement to quantify the amount of interest on the principal sum. But the sub-section talks of "requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum ....". No doubt by the judgment in default of appearance dated 2 August 1990 the petitioners are entitled to be paid also the interests at the rate mentioned in the notice till full and final settlement, which date of full and final settlement is best known to the respondent company. But the petitioners here is not leaving at that but decided to enforce the order by praying to the Court to exercise its discretion to wind-up the company on account of the respondent company's inability to pay its debts. So, at the time of the filing of the petition the Court must be able to know what amount of debts that the respondent company was alleged to have been unable to pay to invoke the presumption that the respondent is unable to pay its debt, after the lapse of three weeks after the service of the notice of demand under sub-section (2)(a) of the Act. This amount, therefore, has to be quantified up to the time of the issue of the notice of demand to the respondent company. This quantification together with the quantified amount in items (i), (ii) and (iv) will be the total sum due from the respondent company to the petitioners as at the date of the issue of the notice of demand for the purpose of sub-section (2)(a) of the Act. Failure to settle these amounts quantified within the three weeks period stipulated under the sub-section will render the presumption to operate against the respondent company for the purpose of s. 218(1)(e) of the Act. In this case the amount of interests listed under item (iii) could easily be quantified by the petitioners at the time of the issue of the notice of demand but they failed to do so. Instead they leave it at large for the respondent company to have to work out to meet the demand within the stipulated three weeks. No doubt the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 are not directly applicable to a case of a winding up of a company under the Companies Act 1965 but the analogy obtained from the authorities in bankruptcy cases must equally apply in company winding-up cases as the consequences of the order made by the Court in both the cases are the same. The order made in each case affects the capacity of the person, one a natural person and the other a legal person. The learned Counsel submitted that the petitioners have obtained a judgment which they can enforce but they would not know when the respondent company is going to settle the said judgment debt. The answer to that is if they care to wait, they have to wait until the respondent company decide to pay up subject, of course, to the accumulated interest till full and final settlement. But in this case, the petitioners are not content to wait but have decided on a certain date to enforce it by asking the Court to wind up the respondent company on the ground that it is unable to pay its debts. So, it becomes the duty of the petitioners to tell the respondent company this amount of debts due and to make payment within the stipulated three weeks period failing which the respondent company is presumed to be unable to pay its debts which would invoke the discretion of the Court by a petition to have the respondent company wound-up under s. 218(1)(e) of the Act. Therefore it is my view that in the circumstances of this case, in order to succeed, the petitioners are required to quantify the amount of debts alleged against the respondent company. For failing to do so under item (iii), the whole notice of demand is affected and the presumption will not arise that the respondent company is unable to pay its debts. The petition of the petitioners in this case is based on those sets of facts to have the Court presumed that the respondent company is unable to pay its debts. For the reason that the notice of demand does not quantify the amount due as at the date of the notice of demand or at any stipulated earlier date, I am of the view that the respondent company cannot be presumed to be unable to pay the debts and the petition based on such a notice of demand is defective, and for that reason alone, the petition must be struck out.

Another aspect of the matter which I observe in regard to this petition of the petitioner is over the non-compliance with the requirements of the rules. Rule 26 require that every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto, and shall be sworn after and filed within four days after the petition is presented. It is a condition precedent to the validity of the petition under the Act that it must be verified by an affidavit referring to the petition to be sworn after and filed within the required number of days after the presentation of the petition. There is something mentioned in s. 6(1) of the Bankruptcy Act 1967 and repeated in r. 106 of the Bankruptcy Rules 1969 in regard to the petition for bankruptcy.

However, in the bankruptcy legislation there is no time frame laid down as in cases for winding-up of a company in the Companies Act 1965. All that is required in regard to the affidavit in bankruptcy cases is that it is to verify the petition for bankruptcy. In *Sobri bin Arshad v. Associated Tractors Sdn. Bhd.* [1991] 3 MLJ 32, a bankruptcy case, the creditor's petition was dated a day after the affidavit verifying the petition was affirmed. Edgar Joseph Jr. J. (as he then was) has this to say on the matter:

> It would appear that the validity of the creditor's petition depends on there being filed in Court an affidavit verifying the truth of the allegation therein. So, for example, the case of Anon is authority for the proposition that every petition for adjudication of bankruptcy must be accompanied with an affidavit verifying the allegations therein or it would not be received ... It is trite law that an affidavit must be made in some cause or matter pending in Court. An affidavit cannot support an 'unborn petition' as a petition comes to life only when presented.

In the present company winding-up case as stated above, the legislation prescribes the time period for the swearing and the filing of the verifying affidavit after the presentation of a petition. It is, therefore, in a worse position than the requirement of the bankruptcy legislation. In *Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise* [1988] 1 MLJ 201, Lim Beng Choon J. cited from the **English and Empire Digest Replacement** Vol. 10 1975 reissue at p. 959 case 5667 where it is stated as follows:

> An affidavit in support of a petition to wind-up sworn before the presentation of the petition is ineffectual and it must be resworn before an order can be made of the petition.

The learned Judge in that case, following the authority in *Sam Hin Timber Co. v. Perusahaan Sri Duyong Sdn. Bhd.* [1983] 2 CLJ 269, ruled that the non-compliance with the said r. 26 does not render the petition a nullity and it is curable by the Court wherein the learned Judge allowed an extension of time to the petitioner to reswear an affidavit to verify the facts and filing and serving of such affidavit before the hearing of the petition.

In the present case, the petition dated 30 April 1992 was presented 4 May 1992. The affidavit verifying the petition was sworn on 30 April 1992, i.e. before the presentation of the petition and not after the presentation as required by the rule and was filed on 6 May 1992, i.e. two days after the presentation of the petition. Thus, at the time of the swearing of the affidavit, the petition was not yet in existence. It is based on an unborn petition. The learned Counsel for the petitioners submitted based on the authorities cited above, that the defect is curable by rr. 193 and 194 of the Rules. In reply, the learned Counsel for the respondent company cited the case of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173 in opposing the petition. In that case, the petitioner presented a petition to wind-up the respondent company after the swearing of the affidavit verifying the same. On the objection by the respondent company, the Court adjourned the proceedings. During the course of the adjournment, the petitioner filed another affidavit verifying the petition. If this refiling is accepted, then the affidavit verifying the petition would appear to have been sworn after the presentation of the petition. After considering the various case authorities cited to him, Syed Othman J. has this to say:

> I do not think r. 193 can be said to apply to the first affidavit, as the affidavit was conceived before the petition. The question of extension or abridgment, to which the rule relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the master of the rolls said in the *Re Western Benefit Building Society*, you cannot verify to an unborn petition. The underlying general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the Court.

On the second affidavit filed during the adjournment his Lordship stated that the very fact that it was filed belies an admission that the first affidavit is bad. Distinguishing two English authorities cited to him where extension of time was allowed, his Lordship stated that in both the cases there had been attempts to file the affidavits within time, and circumstances were shown why they could not be filed in time. His Lordship, therefore, struck out the petition but a fresh petition was allowed to be filed.

Now, having considered the various authorities cited, for and against, with all respect due, I am inclined to agree with the view cited by my two learned brothers in *Sobri's* case, *supra*, and *Chin Yoon's* case, *supra*, in that whatever view is taken as to the purpose of the affidavit verifying a petition be it in a bankruptcy or winding-up case, the general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the Court. It cannot serve the purpose of verifying to something which is non-existent at the time it was sworn. More so, in a winding-up case, where the legislature deem it fit to prescribe time frames for doing certain things, i.e. not only as to verification of a petition already presented but also to be filed within a certain prescribed period. If a formal application to be made for extension of time for filing a subsequent affidavit to verify the petition, it ought to be made under r. 7(1) which states as follows:

> 7. (1) Every application in Court, other than a petition, shall be made by motion and shall be served on the party effected thereby not less than two days before the day named in the notice for hearing of the motion. An application for leave to serve short notice of motion shall be made *ex parte*.

It is, therefore, not sufficient merely to say so in the submission, as in this case, that the Court should apply its discretion to extend time pursuant to r. 193. In an event, what is there to extend? It is not the case where the Court is asked to extend the four days period given by r. 26 but it is more of a case of swearing an affidavit well before the petition is born. I would not exercise my discretion to allow the petitioners to re-swear a second affidavit to verify as this would amount to condoning the flouting of r. 26 to the prejudice of the respondent company and the situation here is not one of those as given in the two English cases cited in *Chin Yoon's* case, *supra*. In the circumstances, I hold that the petition presented in this case is bad for the absence of an affidavit verifying the same in accordance with r. 26 of the Rules and that the notice of demand issued upon the respondent company under sub-section 2(a) of s. 218 of the Act does not help the petitioners to ask the Court to presume that the respondent company is unable to pay its debts. The petition of the petitioners is accordingly struck off and I make no order as to costs.